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THOMAS F. MCFARLAND

January 31, 2005

By UPS overnight mail

Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit, Suite 713  
1925 K Street, N.W.  
Washington, DC 20423-0001

Re: Docket No. AB-33 (Sub-No. 132X), *Union Pacific Railroad Company --  
Abandonment Exemption -- in Rio Grande and Mineral Counties, CO*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Motion For  
Leave To File A Reply To Reply, for filing with the Board in the above referenced matter.

Very truly yours,

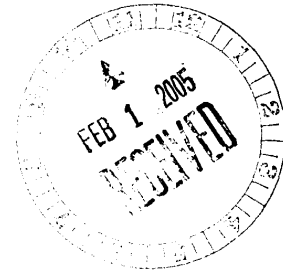
*Tom McFarland*

Thomas F. McFarland  
*Attorney for Denver & Rio Grande  
Railway Historical Foundation*

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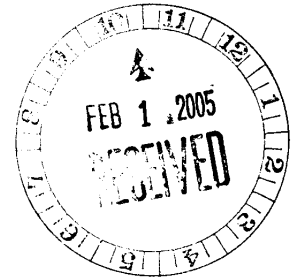


BEFORE THE  
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC RAILROAD )  
COMPANY --ABANDONMENT ) DOCKET NO. AB-33  
EXEMPTION -- IN RIO GRANDE AND ) (SUB-NO. 132X)  
MINERAL COUNTIES, CO )

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**REPLY IN OPPOSITION TO  
MOTION FOR LEAVE TO FILE  
A REPLY TO REPLY**

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**ENTERED  
Office of Proceedings**

**FEB 1 - 2005**

**Part of  
Public Record**

DENVER & RIO GRANDE RAILWAY  
HISTORICAL FOUNDATION  
20 North Broadway  
Monte Vista, CO 81144

Replicant

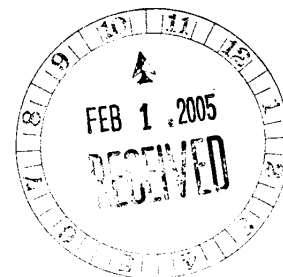
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Attorney for Replicant

DATE FILED: February 1, 2005

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC RAILROAD )  
COMPANY --ABANDONMENT ) DOCKET NO. AB-33  
EXEMPTION -- IN RIO GRANDE AND ) (SUB-NO. 132X)  
MINERAL COUNTIES, CO )

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**REPLY IN OPPOSITION TO  
MOTION FOR LEAVE TO FILE  
A REPLY TO REPLY**

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Pursuant to 49 C.F.R. § 1104.13(a), DENVER & RIO GRANDE RAILWAY  
HISTORICAL FOUNDATION (the Foundation) hereby replies in opposition to a motion for  
leave to file a reply to reply (Motion) filed by Concerned Citizens of Creede and Mineral County,  
Colorado (Concerned Citizens) on January 12, 2005.

**ARGUMENT**

The Foundation feels strongly that the time is past due when pleadings in this 1999  
proceeding should end. Therefore, the Foundation will not file a substantive reply to Concerned  
Citizens' reply to reply, as often accompanies replies in opposition to motions for leave to file  
such a reply. The Foundation instead seeks flat-out denial of Concerned Citizens' motion.  
When petitioning to reopen a decision entered more than five years earlier, Concerned Citizens  
should have provided any alleged justification for their late filing as part of their petition, not as a  
reply to the Foundation's reply to their petition. Their failure to have done so does not warrant  
another round of pleadings at this very late date.

In a transparent euphemism, Concerned Citizens allege that under Board rules, replies to  
replies "are not automatically allowed" (Motion at 1). In truth, under 49 C.F.R. § 1104.13(c),

replies to replies are “not permitted.” Contrary to the impression sought to be created by Concerned Citizens, the Board most often applies that regulation, as evidenced by numerous recent Board decisions collected below:

- (1) *City of Lincoln - Pet. for Declar. Order*, 2004 STB LEXIS 508 at \*4-5 (Finance Docket No. 34425, decision served Aug. 12, 2004) (motion for leave to file surrebuttal denied);
- (2) *Waterloo Ry. Co. - Adv. Aband. - Lines of Bangor & A.R. Co.*, 2003 STB LEXIS 732 at \*2 (Docket No. AB-124 [Sub-No. 2], decision served Nov. 14, 2003) (reply rejected as prohibited reply to a reply);
- (3) *Consolidated Rail Corp. - Declar. Order Proceeding*, 2003 STB LEXIS 630 at \*12 (Finance Docket No. 34319, decision served Oct. 10, 2003) (motion for leave to file reply to reply denied);
- (4) *San Jacinto Rail Ltd. Constr. Exempt. - Build-Out to the Bayport Loop near Houston, Harris County, TX*, 2003 STB LEXIS 390 at \*3, n.5 (Finance Docket No. 34079, decision served July 9, 2003) (motion for leave to file reply to reply denied where reply sought to be addressed was limited to arguments made in an earlier pleading);
- (5) *Paducah & Louisville Ry., Inc. - Aband. Exempt. - in McCracken County, KY*, 2003 STB LEXIS 344 at \*2 (Docket No. AB-468 [Sub-No. 5X], decision served June 20, 2003) (motion to strike reply to reply granted, rejecting contention that reply to reply should be accepted “to provide the Board with a full and precise record”);

- (6) *Waterloo Ry. Co. - Adv. Aband. - Lines of Bangor & A.R. Co.*, 2003 STB LEXIS 222 at \*3-4 (Docket No. AB-124 [Sub-No. 2], decision served May 6, 2003) (reply to reply not accepted where its purpose is to show that the opponent's view of case law is incorrect);
- (7) *Canadian National Ry. Co. - Control - Illinois Central Corp.*, 2002 STB LEXIS 777 at \*2 (Finance Docket No. 33556, decision served Dec. 23, 2002) (motion to strike reply to reply granted); and
- (8) *Lackawanna County R.R. Auth. - Acq. Exempt. - F&L Realty, Inc.*, 2001 STB LEXIS 814 at 2, n.3 (Finance Docket No. 33905, decision served Oct. 22, 2001) (reply to reply rejected).

While the Board occasionally waives that rule upon a showing of good cause, no such good cause was shown in the Motion in this proceeding. It is alleged that the reply should be accepted for filing because fairness dictates that Concerned Citizens be permitted to reply to legal arguments that were made for the first time in the replies filed by the Foundation and Union Pacific Railroad Company. (Motion at 1-2).

On the contrary, Concerned Citizens should have provided any purported justification for the late filing of their petition in the petition itself. Their failure to do so does not constitute good cause to waive the prohibition against replies to replies. The Board rejected a similar contention in rejecting a reply to reply in *Waterloo Ry. Co. - Adv. Aband. - Lines of Bangor & A.R. Co.*, *supra*, 2003 STB LEXIS 222 at \*3-4, viz.:

... The Trustee argues that we should accept its pleadings because CN's reply 'blatantly mischaracterizes case law pertaining to the availability of discovery in abandonment cases' and 'grossly overstates the alleged burden of

complying with the Discovery Requests.’ This, however, is merely an argument that CN’s interpretation of case law and view of its compliance burden is incorrect.

The absence of good cause for Concerned Citizens’ reply to reply is evident. Concerned Citizens have alleged that their petition to reopen was directed at the Board’s decision in this proceeding served June 22, 2004. (Motion at 2). But that decision itself denied petitions to reopen the Board’s earlier decision in this proceeding served May 11, 1999. There have been four petitions by the Creede-area “tag team” to reopen the latter decision, viz:

<u>Petition Filed By:</u>	<u>Date of Filing:</u>
City of Creede	November 26, 1999
City of Creede (second petition)	October 14, 2003
Adjacent Landowners	December 19, 2003
Concerned Citizens	November 5, 2004

The Foundation has been required to file replies to each of those four petitions over a five-year period. There is absolutely no justification for the Board’s acceptance of still further pleadings in the form of Concerned Citizens reply to reply. What the Interstate Commerce Commission said in *Potomac Electric Power Co. v. Penn Central Transp. Co.*, 358 I.C.C. 473 (1978), 1978 ICC LEXIS 24 at \*15-16, applies with added force in the proceeding at hand, viz.:

There must be finality to litigation. To grant defendant’s petition would be to invite relitigation of an issue which has been thoroughly explored in an already overlong proceeding. We will not unduly prolong the administrative process . . .

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, the Motion for leave to file a reply to reply should be denied.

Respectfully submitted,

DENVER & RIO GRANDE RAILWAY  
HISTORICAL FOUNDATION  
20 North Broadway  
Monte Vista, CO 81144

Replicant

*Thomas F. McFarland*

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Attorney for Replicant

DATE FILED: February 1, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2005, I served the foregoing document, Reply In  
Opposition To Motion For Leave To File A Reply To Reply, on the following:

*by UPS overnight mail:*

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Heidi Gunst  
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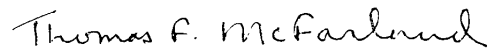
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